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No. ~~21,692~~

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

:EWARD L. UDALL, Secretary of)
ıe Interior, and the State of)
.aska,)
)
Appellant,)
)
v.)
)
DREW J. KALERAK, et al,)
)
Appellee.)
)

On Appeal From the United States District Court,

District of Alaska

Brief for Appellees,

Andrew J. Kalerak, Jr., et al

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SUBJECT INDEX

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aska,)
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Appellant,)
)
-vs-)
)
DREW J. KALERAK, et al,)
)
Appellee.)

BRIEF OF APPELLEE

I.

STATEMENT OF JURISDICTION

The District Court's unreported opinion appears at ges 207-223 of the record. The decision of the Secretary the Interior is reported at 73 I. D. 1 and appears at ges 7-28 and 177-198 of the record.

Appellees brought action in the District Court of the strict of Alaska, seeking reversal of a decision of the cretary of the Interior rejecting their individual appli- ions for settlement or occupancy claims on Alaska lands.

R. 7-28, 177-198). The District Court granted summary judgment for the appellees on October 31, 1966. (R. 224-225). The District Court had jurisdiction under the Administrative Procedure Act, 5 U.S.C.A., Sec. 1001, et seq., and, in particular, 5 U.S.C., Sec. 1009. Jurisdiction of this Court rests on 28 U.S.C., Sec. 1291.

The appeal originated in a decision of the Anchorage, Alaska office of the Bureau of Land Management refusing to accept for recordation notices of settlement and occupancy claims of appellees. (R. 209). Appellees appealed to the Office of Appeals and Hearings of the Bureau of Land Management which ruled in their favor (R. 209). Appellants then appealed to the Secretary of the Interior, who reversed the decision of the Office of Appeals and Hearing (R. 209).

STATUTES AND REGULATIONS INVOLVED

Act of July 7, 1958, 72 Stat. 339-352 (48 U.S.C.), Sec. 4, provides in pertinent part:

> As a compact with the United States, said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States . . . .

ction 6(a) provides in pertinent part:

> For the purpose of furthering the development of and expansion of communities, the State of Alaska is hereby granted and shall be entitled to select, within twenty-five years after the date of the admission of the State of Alaska into the Union, . . . other public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection not to exceed another four hundred thousand acres of land, all of which shall be adjacent to established communities or suitable for prospective community centers and recreational areas.

ction 6(b) provides in pertinent part:

> The State of *Alaska*, in addition to any other grants made in this section, is hereby granted and *shall be entitled to select*, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred fifty thousand *acres from the public lands of the United States in Alaska which are vacant, unappropriated and unreserved at the time of their selection*.

ction 6(g) provides in pertinent part:

> * * * The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State. *Upon the revocation of any order* of withdrawal in Alaska, *the order of revocation shall provide for a period of not less than ninety days before the date on which it otherwise becomes effective* * * * during which period the State of Alaska *shall have a preferred right of selection*, subject to the requirements of this Act, * * *.

C.F.R., Section 2222.95(1966) provides in pertinent part:

> (1) (a) *State preference right of selection; waivers*. The acts of July 28, 1956, (see Sec. 76.7), and July 7, 1958 (see Sec. 76.11), provide that upon the revocation of any order of withdrawal in Alaska,

> the order of revocation shall provide for a period of not less than 90 days before the date on which it otherwise becomes effective during which period the State of Alaska shall have a preferred right of selection under the acts of 1956 and 1958, . . .
>
> (b) Segregative effect of applications. Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the appropriate land office properly describing the lands as provided in Sec. 2222.9-3(c) (1) (iii), (iv), and (v).

blic Land Order 3022, 28 F.R. 3661, provides in pertinent

rt:

> 3. Subject to any existing valid rights and the requirements of applicable law, the public lands are hereby opened to settlement and to filing of such applications, selections, and locations as are allowable on unsurveyed lands in accordance with the following:
>
> a. Until 10:00 a.m. on July 8, 1963, the State of Alaska shall have a preferred right to select the lands in accordance with provisions of the Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b) and section 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), and the regulations in 43 CFR Part 76.
>
> * * *
>
> 5. The lands will be subject to the operation of the public land laws generally, including location under the United States mining laws, beginning at 10:00 a.m. on July 8, 1963 . . . .

STATEMENT OF THE CASE

The appellees brought this action in the district court to reverse and set aside a decision of the Secretary of the Interior rejecting their individual applications for certain tracts of land in Alaska (R. 1). The land in controversy is located in townships 11 and 12 North, ranges 1 and 2 West, Seward Meridian, Alaska (R. 8). Both sides filed motions for summary judgment (R. 130, 136, 156). The District Court granted appellees' motion (R. 224).

Prior to Statehood all the lands in Alaska that were not reserved or withdrawn were considered in the federal public domain and subject to application under the various land laws for mining, homesteading, etc.

On March 29, 1949, by Public Land Order 576, 14 F.R. 114, the land in question was withdrawn from appropriation by the United States government (R. 8, 208).

The 85th Congress on July 7, 1958 adopted Public Law 8-508 to provide for the admission for the State of Alaska into the Union. This Act, 72 Stat. 339, 48 U.S.C. 9026-927, permitted Alaska, in section 6(b), to select over a twenty-five year period, 102,550,000 acres of land from the public lands of the United States of America in Alaska. Such lands had to be vacant, unappropriated, and unreserved at

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

he time of their selection.

In order that the State of Alaska might have a preference right of selection following the revocation of any withdrawal order, further provision was made in Section 6 (g) of the Statehood Act. This section provided that upon the revocation of any order of withdrawal in Alaska, the State of Alaska would have a preferred right of selection for a period of not less than ninety days before the date on which the withdrawal order would otherwise become effective.

On the 8th of April, 1963, by Public Land Order 3022, 28 F.R. 3661, that portion of Public Land Order 576 pertaining to the lands in question in this litigation, was revoked by the Secretary of the Interior and the land released for appropriation. (R. 9-10, 208.)

As required by Section 6(g) of the Statehood Act, Public Land Order 3022, 28 F.R. 3661, provided that until 1:00 a.m. on July 8, 1963, the State of Alaska had a preferred right to select the lands in accordance with the provisions of section 6(g) of the Act of July 7, 1958, 72 Stat. 339, 48 U.S.C., pp. 9026-9027.

However, on January 8, 1963, while the land involved here was still withdrawn from all forms of appropriation

y virtue of Public Land Order 576, and exactly three months
fore the revocation of Public Land Order 576, an appli-
tion (A-058566) for selection of 26,880 acres of land as
rt of its allotment under section 6(b) of the Statehood
t was filed with the Anchorage Land office by the State
Alaska (R. 178). The state filing was made in response
a request of the City of Anchorage (R. 159). The appli-
tion stated on its face that the lands were withdrawn by
blic Land Order 576. (Appendix A of appellant Udall's
ief).

During the ninety-day period from April 8, 1963 until
:00 a.m. on July 8, 1963, no selection of the lands invol-
d in this case was made by the State of Alaska (R. 208).
addition, no amendment to its January 8, 1963 application
s filed by the State wherein the lands claimed by the ap-
llees were described (R. 208).

Between May 27, 1965 and June 17, 1965, more than twenty
o months after the expiration of the preference period
nted the State of Alaska by section 6(g) of the Statehood
, appellees filed notices of location of settlement or
cupancy claims with the Anchorage land office. (R. 7, 208).

Subsequent to the date of the filing of appellees' loca-
n notice, the State of Alaska filed a blanket selection,

rial No. 062905, over the same area as in its filing of
nuary 8, 1963, including the area embraced by appellees'
cation notices. (R. 209.)

The local office of the Bureau of Land Management re-
sed to accept appellees' notice for recordation on the
ounds that the lands described in the claims were in-
uded in a valid selection by the State and therefore
re segregated from all applications and appropriations
the Public Land laws (R. 2). On appeal, the Bureau of
nd Management rejected the State's selection applications
sofar as they covered lands described in paragraph 4 of
blic Land Order 576, *supra*, and reversed the land office
cision insofar as it refused acceptance of appellees'
tices of location for recording (R. 29-31). On appeal
the Secretary of the Interior, on January 20, 1966,
decision of the Chief of the Office of Appeals and
arings, Bureau of Land Management, was reversed and the
cision of the land office refusing to record the several
tices of occupancy of settlement was affirmed (R. 7-28).
District Court reversed the decision of the Secretary
the Interior on the grounds that the State's applica-
on of January 8, 1963 was a nullity, and that the State
not exercised the preferred right of selection afforded

by Section 6(g) of the Statehood Act. (R. 207-223). The strict Court held that the decision of the Secretary of e Interior, filed on January 20, 1966, was not in accord- ce with law, and was arbitrary and capricious, since it s in excess of statutory authority (R. 207-223). Judg- nt was entered on appellees' motion for summary judgment R. 224).

QUESTIONS PRESENTED

In the opinion of the appellees the only meaningful ues are: (1) whether the application for selection filed the State of Alaska on January 8, 1963, insofar as it raced lands withdrawn by Public Land Order 576, was trary to the provisions of the Alaska Statehood Act thus a nullity, void ab initio; and (2) whether the ision of the Secretary of the Interior in holding that premature selection filed by the State of Alaska on uary 8, 1963 was valid and segregated the land from ropriation was not in accordance with law and arbitrary capricious.

[illegible]

[illegible]

SUMMARY OF ARGUMENT

I

There can be no question that the District Court had risdiction under the Administrative Procedure Act to view the decision of the Secretary of the Interior.

II

The application for selection of land filed by the ate of Alaska on January 8, 1963 was meaningless and id ab initio, inasmuch as it was contrary to the clear nd unambiguous language of Sections 6(b) and 6(g) of the aska Statehood Act.

Under Section 6(b) of the Statehood Act, the State f Alaska is specifically prohibited from selecting land hich is in a withdrawn status. Regarding withdrawn lands, ection 6(g) provides that where an order of withdrawal s revoked the State of Alaska shall have a preferred ight of selection during the ninety-day period following h issuance of the order revoking the withdrawal.

Thus, these sections of the controlling statute with-u any ambiguities provide a procedure by which the State f Alaska may select lands which have been withdrawn from h public domain. Nothing exists in the language of the

atehood Act or its legislative history which would give y indication that Congress intended the State of Alaska follow any course with respect to withdrawn lands, ex- ot that which is clearly spelled out in the statute.

Brcause the application filed by the State of Alaska January 8, 1963 was without authority of law, it was thing more than a request that paragraph 4 of Public d Order 576 be revoked.

III

The Secretary of the Interior, in his decision, avoid- d any discussion of the statutory language of the Alaska tehood Act. Instead, he and appellants, in their efs, put primary reliance on the contention that the d in question was segregated by the action of the State Alaska when it prematurely filed its selection on Jan- y 8, 1963. This is an erroneous and misleading appli- ion of law. Under the law as it has developed certain uirements must be met in order to apply the segregation orty. These requirements are not present in the facts this case.

First, the segregation theory applies only to public ds. At the time Alaska filed its selection on January

3 1963, the land in question was withdrawn, and by definition, not public land.

Second, segregation cannot apply where the selection i void *ab initio*. In this instance, an attempt was made t select lands which were not yet available and as such contrary to the provisions of the Alaska Statehood Act. Such a selection made without statutory authority is not just invalid and voidable, but void *ab initio*.

Any application of the segregation theory to the lands in question would result in a preference right far beyond that contemplated or authorized by Congress in Section 6(g) of the Statehood Act.

IV

The Secretary of the Interior also relied upon an amendment theory to give validity to the State's selection of the land in question. His conclusion that the amendments filed by the State of Alaska during and after the preference right period were reaffirmations of the State's of the State's original selection and were treated as though the State had refiled its original application at the time of the amendments.

This is nothing more than an attempt to revive the

id selection filing by pulling it up with bootstraps.
ere is no legal foundation for such a holding and the
cretary's argument is completely misleading. The argu-
nt on this point depends entirely on two or three land
partment decisions which are confusing and without appli-
ion to the case now before the Court. But more impor-
nt is the inescapable fact that the amendments never
scribed or covered the land in question.

V

In making its selection of the land on January 8,
3, the State was taking action on behalf of the City
Anchorage. It was the City which initiated the proceed-
s to revoke the existing withdrawal order. Inasmuch as
tion 6(g) of the Statehood Act forbids the State of
ska to alienate its right of selection, this selection
contrary to law and ought to be struck down.

VI

The Alaska Statehood Act provides a number of types
special grants of land to the State of Alaska in addi-
n to the general grants provided for in Section 6(b).
particular provision, Section 6(a), establishes a meth-
by which the State could select land for the benefit

its cities. Both Section 6(a), the community land
ovision, and Section 6(b), the general land selection
ovision, set a definite limit on the acreage which can
selected under each section. When Alaska used Section
b) to acquire land for the benefit of the City of Anch-
age, the State was favoring the citizens of Anchorage
the expense of the people of Alaska as a whole, and
is was a violation of the Equal Protection Clause of
e Fourteenth Amendment.

VII

The Secretary of the Interior has refused to correct-
apply the provisions of the Alaska Statehood Act and
s been arbitrary and capricious in his refusal to per-
t the filing of appellees' valid claims. His decision
s not in accordance with law. The decision of the Dis-
ict Court in reversing the Secretary should be affirmed.

ARGUMENT

I

THE DISTRICT COURT PROPERLY ASSERTED JURISDICTION TO RVIEW THE DECISION OF THE SECRETARY OF THE INTERIOR UNDER IE ADMINISTRATIVE PROCEDURE ACT.

This Court has recently held that the decisions of the
Scretary of the Interior regarding public lands are sub-
jct to judicial review under the provisions of the Adminis-
tative Procedure Act. Coleman v. United States, 363 F.2d
10, (9th Circ. 1966). See also Adams v. Witmer, 271 F.2d
2 (9th Circ. 1958); and Denison v. Udall, 248 F.Supp. 942
(. Ariz. 1965).

II

UNDER THE STATUTORY LANGUAGE OF THE ALASKA STATEHOOD T, THE PREMATURE FILING BY THE STATE OF ALASKA WAS A LLITY AND WITHOUT EFFECT.

By virtue of paragraph (4), Public Land Order No. 576,
March 29, 1949, 14 F.R. 1614, the disputed lands in this
se were withdrawn from all forms of appropriation under
e public land laws. This withdrawal remained in force
ntil revoked in part by the Public Land Order No. 3022 on
pril 8, 1963.

The Alaska Statehood Act specifically spells out the

lationship between the federal government and the State
Alaska regarding the lands to be granted to Alaska.
ction 4 of the Act provides in part that the State of
aska disclaims all right and title to any lands not
anted or confirmed to the State by or under the authority
the Statehood Act. Section 6(b) of the Act provides
at, in addition to other grants, the State is entitled to
lect within twenty-five years some 102,550,000 acres
rom the public lands of the United States, in Alaska,
ch are vacant and unappropriated and unreserved at the
ne of their selection". Section 6(g) of the Act then
ovides that upon the revocation of any land order of
thdrawal in Alaska the order of revocation shall provide
a ninety day period during which the State of Alaska
ll have a preferred right to select public lands.

Here it has been clearly set out that under Section
() of the Act, Alaska may select only land which is va-
at, unappropriated or unreserved at the time of the sel-
cion from the public lands of the United States. Section
(), on the other hand, provides a method by which the
tte of Alaska may have a preference when lands which have
en withdrawn from the public domain are ordered released
rm their withdrawal status.

Since the lands in question had been withdrawn from e Public Domain until April 8, 1963, the State could not lidly select them on January 8, 1963, under Section 6(b). t only were these lands reserved, but land which is withawn is not considered "public land", referred to in Secon 6(b). Northern Lumber Co. v. O'Brien, 204 U.S. 190 906).

With the applicability of Section 6(b) so clearly led out in this case, the State's January 8, 1963 selecon must turn upon an interpretation of the language in ction 6(g). Here Congress has stated in clear and unamguous language, that where land has been withdrawn, upon e revocation of the order of withdrawal, the State shall ve not less than ninety days during which to exercise a eferred right of selection. Where Congress has expressed self in clear and unambiguous language, it must be held have meant what it plainly expressed. Easson v. C.I.R., 9 F.2d 653 (9th Cir. 1961). Neither the administrative gencies nor the courts are permitted to deviate from strict tutory construction when no ambiguity is present in the ntrolling statute. Busey v. Deshler Hotel Co., 130 F.2d 8 (6th Cir. 1942). See also Drew v. Lawrimore, 257 F.Supp. 5 (D. S. C. 1966); and Mid-Continent Petroleum Corp. v.

L.R.B., 204 F.2d 613 (6th Cir. 1953), cert. den. 346 S. 856. This principle of statutory construction has en applied with equal force to the determinations of the reau of Land Management on several occasions. *Morris v. ited States*, 174 U.S. 196 (1898); and *Burfenning v. icago, St. Paul, Minneapolis & Omaha Ry. Co.*, 163 U.S. 1 (1895). There is nothing in the legislative history the Alaska Statehood Act which provides any indica- on that Sections 6(b) and 6(g) of the Act should be nstrued in any way except that which appears in the teral words. See House Report No. 624, 1st Sess. 85th ng. (June 25, 1957). Also see generally Congressional cord, May, June, 1958, 85th Cong. 2nd Sess.

The Secretary of the Interior made no effort to cons- ne the statutory language of Sections 6(b) and 6(g) of Alaska Statehood Act in his decision. In fact, he egated all references to these controlling legislative nctments to the footnotes of his decision. (pp. 3-4). ch appellant State of Alaska and appellant Udall appear recognize this fatal defect in their respective briefs, neither brief suggests that the Secretary's statutory erpretation as the administrative officer of the Act uld carry additional weight with the Court.

Instead, the Secretary relied upon a regulation in effect at the time the State of Alaska first filed its selection as controlling in this instance (p. 9). This regulation, 43 C.F.R., Sec. 2222.9-5(b) (1966), provides in substance that lands desired by the State will be segregated from all appropriations when the House files its application for selection in the appropriate land office. The District Court correctly held that this regulation cannot apply to lands that are withdrawn from all forms of appropriation under the public land laws. It was limited by statutory language to Section 6(a) of the Act, for to apply it to Section 6(g) would add to Section 6(g) something vastly different than that expressed or intended by Congress. While regulations are entitled to consideration in construing an ambiguous statute, a regulation in direct conflict with unambiguous statutory provisions is clearly void. Federal Maritime Commission v. Anglo-Canadian Shipping Co., 335 F.2d 255, (9th Cir. 1964); U. S. v. Maxwell, 278 F.2d 206 (8th Cir. 1960).

The only interpretation of Section 6(g) of the Act by the Secretary took place on April 8, 1963, when he issued Publid Land Order 3022, 28 F.R. 3661. In this order, which revoked the withdrawal made by paragraph (4) of Pub-

ic Land Order 576, 14 F.R. 1614, the Secretary expressed
a clear interpretation of the meaning and intent of Section
g) of the Alaska Statehood Act. In that Order it is stated
at "until 10:00 a.m. on July 8, 1963, the State of Alaska
all have a preferred right to select the lands in accord-
ce with the provisions of the Act . . .". This is a clear
irection to Alaska that Section 6(g) of the Act requires a
ling within the ninety-day preference period and is the
ly statutory interpretation made by the Secretary to which
e decision in *Udall v. Tallman*, 308 U.S. 1 (1965), i.e.,
at great deference is to be shown to the interpretation
ven a statute by the officers or agency charged with the
atute's administration, applies.

The District Court correctly held that this interpreta-
on in Public Land Order No. 3022 of April 28, 1963, was
e only reasonable interpretation of Section 6(g),(p. 13).
her contrary interpretation by the Secretary would have
en unreasonable and therefore arbitrary and capricious,
d without weight under the authority of *Udall v. Tallman*,
pra; *Boesche v. Udall*, 373 U.S. 472 (1963); *Best v. Humbolt
acer Mining Co.*, 371 U.S. 334 (1963). However, as pointed
ove, the Secretary never even attempted to construe the
atutory language of Sections 6(a) and 6 (b).

III

SEGREGATION THEORY RELIED UPON BY THE SECRETARY OF E INTERIOR IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

Faced with clear legislative direction requiring select- n of withdrawn lands by the State within a ninety-day riod following the release of the lands, the Secretary . the Interior invoked the so-called segregation theory s the avenue by which he could refuse to record appellees' veral notices of occupancy or settlement.

It is clear from the argument above that Section 6 g) of the Alaska Statehood Act does not permit any filing y the State of Alaska which does not specifically conform c the statute.

It is contended by appellants, however, that when the tate's selection application of January 8, 1963 was allowed nd filed in the local land office by posting in the tract ok, the land was segregated from subsequent claim and entry egardless of statutory requirements. But a close study f authorities will reveal that this contention is based pon a faulty understanding of the law and that the segre- ation theory is not applicable to the State of Alaska's anuary 8, 1963 filing.

There exists a long line of cases invoking the segre-

tion theory in a number of instances. However, the gregation theory is not without its exceptions as point- out by this Court in *Southern Pacific Ry. Co. v. Ambler ain & Milling Co.*, 66 F.2d 670, 674 (9th Cir. 1933).

Appellants have put great faith in *Hastings v. Dakota y. Co. v. Whitney*, 132 U.S. 357 (1889), as a case which olds the Secretary's reliance on the segregation theory.

In the *Hastings and Dakota Ry. Co.* case, *supra*, one ner, in 1865, filed a homestead affidavit in the local ad office. This affidavit failed to state, as required y law, that any member of Turner's family was residing on h land or that any improvement had been placed on the ad. Actually, neither requirement was met. The entry a allowed, however, and appeared on the records until 82, when it was finally cancelled. Subsequently, in 87, the defendant, Whitney, filed a homestead claim on h same land and received a patent from the government. h question before the court was whether Turner's entry n filing had so segregated the land so as to exclude it rm a railroad grant which became effective when the alroad filed its map of definite location in 1867. If h land had been segregated by the entry of Turner then t would not have been part of the public lands in 1867,

d the 1877 homestead entry of Whitney would prevail.

Counsel for the railroad in Hastings and Dakota Ry. o., supra, contended that the Turner homestead entry was "nvalid on its face" because the entry failed to show the ttlement and improvements required by law. The court ejected this argument, and appellant State of Alaska has oted extensively from Hastings, supra, in an attempt to ply the "invalid on its face" language of that case to h Alaska filing of January, 1963. However, if appellant ad continued the quote, a clear distinction between Hastngs and Dakota Ry. Co., supra, and the case now under con- ieration would have been evident. The court in Hastings ontinued:

> "In the case before us, at the time of the location of the Company's road, an examination of the tract books . . . would have disclosed Turner's entry as an entry of record, accepted by the proper officers in the proper office, together with the application and necessary money - an entry the imperfections and defects of which could have been cured by supplemental affidavit or by other proof of the requisite qualifications of the applicant. Such an entry attached to the land a right which the road cannot dispute for any supposed failure of the entry-man to comply with all the provisions of the law under which he made his claim." 132 U.S. at 364 (emphasis supplied)

t is clear that Turner's entry could have been cured by a

plemental affidavit or by some other proof of the quali- ations of the applicant. But the State of Alaska's ection on January 8, 1963 could not have been cured by means since it was clearly in violation of the statu- y requirement that precluded filing on withdrawn lands the affirmative requirement to file in the ninety day ference period. While Turner's entry may have been valid on its face", it was curable and thus not void *initio*.

A case much more in point than any cited by the appel- ts is that of *Northern Pacific Ry. Co. v. DeLacey*, 174 . 622 (1898). In that case, the railroad company filed map of definite location on March 26, 1884. However, in 1869 one John Fleck had filed a declaratory state- of his intention to purchase the land in question under preemption laws. Fleck left the land some months later did not continue to reside on the land. By examination he current statutes, the Supreme Court in *DeLacey*, *supra*, d that claimants of the preemption rights must make pro- proof and payment of lands claimed within thirty months owing the date prescribed for filing. The Supreme Court ed:

> "In such a case as this, where the forfeit-

> ure occurs by the expiration of the thirty months within which to make proof and payment, the record shows that the claim has expired; that it no longer exists for any purpose, and therefore it cannot be necessary in order that the law shall have its full operation that acknowledgement of this fact should be made by an officer of the land office. . . . There was no existing claim at the time of the filing of the map of definite location . . . . It had expired and had become wholly invalid by operation of law. The thirty months had expired years before the filing of this map . . . . 174 U. S. at 633-34.

The Supreme Court went on to distinguish DeLacey from ase such as <u>Hastings and Dakota Ry. Co.</u>, <u>supra</u>, by stat-
:

> A case of this kind, which simply necessitates a reference to the record to ascertain whether the filing has expired and with it the rights of the claimant, differs from the case where the filing may have become subject to cancellation; but the record does not show it, and the right to cancel depends upon evidence be found <u>dehors</u> the record. In such case, while the facts might invalidate the claim, yet as they are not of record and required to be ascertained, the claim itself, though possibly not enforceable, is still an existing claim within the meaning of the law, and it would remain such until cancellation had taken place or some other act done legally terminating existence of the claim.
>
> Upon the facts as found in this case, it seems to us that there was no claim against the land at the time of the passage of the Act of 1864, and years before the time of the filing of the map of definite location

> 1884 the claim that once existed (in 1869) in favor of Flett had ceased to exist in fact and in law, and the title of the land passed to the railroad company by virtue of the grant contained in the Act of 1864 and by reason of the filing of its map of definite location March 26, 1884. 174 U.S. at 637-38.

In the case now under consideration by this Court, h selection of land by Alaska prior to the revocation of h withdrawal order made that selection by operation of a a nullity. As with the DeLacey case, supra, the law ofeited the right and canceled the entry just as effectvly as if that fact were evidence by an entry upon the eord. Since the Alaska selection entry contained notice ht the lands were in a withdrawal state, no evidence dehors h record was necessary. The Alaska land selection was not ut invalid on its face, it was void on its face.

The holding of Northern Pacific Ry. Co. v. DeLacey, upra, was later affirmed by the United States Supreme Court n Oregon and California Ry. Co. v. United States, 190 U.S. 86 (1902), a case involving the Oregon Donation Acts. In regon and California Ry. Co., the Supreme Court discussed oth Hastings and Dakota Ry. Co. v. Whitney, supra, and orthern Pacific Ry. Co. v. DeLacey, supra, and applied the easoning of the latter case. See also, Union Pacific Ry.

v. Fisher, 28 L.D. 75 (1899); *Union Pacific Ry. Co.*
Hartwich, 26 L.D. 680 (1898); *St. Paul, Minneapolis and*
aitoba Ry. Co., 23 L.D. 539 (1896).

The Secretary of the Interior acknowledged in his de-
ion that there was a general rule in the Lands Depart-
et establishing that an application made for land while
t is withdrawn is invalid and does not become valid upon
revocation of the withdrawal. *Atherton Sinclair Bur-*
igham, et al., 71 I.D. 126, 128, 129 (1964); *Hunt v.*
tte of Utah, 59 I.D. 44 (1945). However, the Secretary,
fer purporting to examine the reasons underlying this
ue, determined that the general rule did not require the
eection of Alaska's January 8, 1963 selection. This de-
emination by the Secretary fails to take into considera-
in the United States Supreme Court decision in *Northern*
uber Company v. O'Brien, supra.

In the *Northern Lumber* case certain lands were with-
rwn from the public domain for a possible railroad route
f the *Lake Superior and Mississippi Railroad Company*.
usequent to this withdrawal by the Land Department, Con-
rss, by the Act of July 2, 1864, granted to the Northern
aific Railroad Company "every alternate section of pub-
i land . . . " upon filing of the railroad's map of

finite location. The Lake Superior and Mississippi ilroad Company filed its map of definite location in 6 but the lands in dispute fell outside of their final nt. In 1882 the Northern Pacific Railroad Company ed its map of definite location which included the puted lands. The Supreme Court held that withdrawn ds could not be included in the 1864 grant to the Norrn Pacific Railroad. It reasoned that:

> "At the time of the grant of 1864 to the Northern Pacific Railroad Company the lands here in dispute were . . . among those <u>withdrawn</u> by the Land Department from preemption, settlement, and sale . . . They were not, therefore, public lands embraced by the . . . grant [to the Northern Pacific Railroad] . . . The grant of the Northern Pacific Railroad Company spoke as of the date of the Act of July 2, 1864 . . . . [As of] the date of the grant of July 2, 1864, [these lands] were not in the category of lands embraced by that grant of "public lands". When the withdrawal order ceased to be in force, the lands so withdrawn did not pass under the latter grant, but became a part of the public domain, subject to be disposed of under the general land laws, and not to be claimed under any railroad land grant. 204 U.S. at 196-97.

This decision in the Northern Lumber case, supra, is elevant to the case now under consideration by this Court. ection 6(b) of the Alaska Statehood Act permits Alaska to elect only "public lands" which are vacant, unappropriated,

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d unreserved at the time of their selection. According
Northern Lumber, the Supreme Court has held that with-
awn lands are not public lands. Thus, Alaska's selection
January 8, 1963, filed on withdrawn lands, would be with-
t segregative effect. The lands in dispute were not "pub-
lands" as required by law under Section 6(a) of the
tehood Act. When withdrawn lands were restored to the
lic domain, they were without any encumbrance. Alaska's
ection of January 8, 1963 did not alter this in any way.

It is interesting to note that the segregation theory
had its greatest force in contests between claimants
der homestead entries and a claimant under a railroad grant
t the segregation theory was to defeat a number of rail-
d claims was acknowledged by the United States Supreme
rt in *Northern Pacific Ry. Co. v. Amacker*, 175 U.S.
6 (1899). The Supreme Court in that case stated:

> There is no real hardship in enforcing this rule [the segregation theory] for if the individual seeking to maintain his homestead fails by reason of any defect he has no recourse on the government for the fees he has paid or for any compensation for the time and labor he has expended, while, on the other hand, the general provision of railroad land grants is to the effect that if the title to any tract within the place limits fails, the company may reimburse itself by a selection within the indemnity limits. It is not therefore strange that the rulings

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> of the land department, as well as of the courts, have been uniformly favorable to the individual contesting with a railroad company the right to a particular tract of land. 175 U.S. at 567.

In the case now under consideration, the Secretary of Interior has attempted to place the State of Alaska in position of the homesteader and the appelless herein the position of a railroad company. This is completely trary to the underlying policy of the segregation theory.

It should also be noted that the State of Alaska is precluded from selecting other land if the District rt's decision reversing the Secretary is affirmed. Un- Section 6(b) of the Alaska Statehood Act, the State is mitted to select a total of 1,550,000 acres.

The Secretary of the Interior in his decision and pellants in their briefs, view the premature filing by State of Alaska as a simple invalid filing which still erates to segregate the land in question.

However, since this filing was contrary to statute, as not only invalid but void ab initio. This distinc- was made in a number of early Land Department decisions. regon and California R.R. Co. v. Jones, 22 L.D. 349, 86), it was held that a donation claim to a tract of n, not included in the original donation claim, but

ed after the expiration of the Donation Law, was void initio and void on its face. The segregation theory inapplicable to a filing void ab initio.

In Union Pacific Ry. Co. v. United States, 17 L.D. (1893), a case very much in point with the case now ore this court, it was held that a Nebraska school in-nity selection made prior to statutory authority there-e was not just invalid, not just voidable, but absolutely d ab initio, and thus could not operate to segregate lands. When Alaska filed its selection on the land in dispute, the land was not subject by statutory thority to selection until the withdrawal order had been oked. Thus, the selection by Alaska on January 8, 1963 without the authority of law and absolutely void ab itio.

The Secretary of the Interior's decision in the case under review admitted that, "the cited cases do not volve the segregative effect of an application or entry operly allowed because the lands applied for were un-lable (p. 11). However, the Secretary stated that the was equally pertinent to unavailable land and cited is authority Keating et al v. Doll, 48 L.D. 199 (1921).

In Keating, supra, Doll settled on the land under a

ecial use permit and had made valuable improvements
n the land while the land was still withdrawn as part
a national forest. At the time the land was released
m withdrawal, Doll was in the penitentiary on a murder
rge. Keating and Fox filed on the land. Upon Doll's
ease, he filed a supplemental application. Since neither
nor Keating had alleged settlement, and since Doll's
vileges and immunities were not suspended while he was
the penitentiary, Doll's claim to the land was superior
that of Fox and Keating. Thus the case, properly, is
authority for the segregative effect of a filing on
hdrawn land, but a decision on the effect of a valid
plemental application on prior invalid applications,
e the only reason the supplemental application was not
t in time was that the homesteader was in the state pen-
ntiary. The *Keating* case was later cited for the propo-
on that a contest cannot be brought for reasons which
apparent in the records of the Department of Interior.
ymonds v. Cooper, 60 I.D. 358 (1949).

The holding in *Keating et al v. Doll*, *supra*, did not
lve the segregation theory, even though such theory was
ioned in the case as part of the dictum. In addition,
ffort was made in *Keating et al v. Doll*, *supra*, to exam-

n previous Land Department and United States Supreme
urt decisions involving the segregation theory. Finally,
decision in *Keating* states that Doll's entry was void-
be, not void, and could be cured by filing supplemental
plication, which Doll had done.

A number of other Land Department and Interior Depart-
et decisions cited by the Secretary and appellants in
ir briefs deal with oil and gas leases. Since such leases
r completely subject to the control of the Secretary of the
erior and their administration does not involve stat-
try interpretation or statutory requirements, these cases
r not relevant to the facts of this case now under con-
ieration by this Court. See *Joyce A. Cabbott*, 63 I.D.
2 (1956); *Max L. Kreuger, Von B. Connelly*, 65 I.D. 185
158).

The law as it has developed clearly precludes the ap-
lication of the segregation theory to the facts of this
ae. The Secretary of the Interior recognized this with
espect to previous Departmental decisions (p. 12-13). With-
ut adknowledging the United States Supreme Court decisions
ited above, he went to examine the so-called policy behind
he departmental decisions and ruled that the administrative
onvenience and considerations of equity which shaped the

eral rule are not present in the case now under consid-
ation. Such a determination is not in accordance with
law, as pointed out above, and results in an arbitrary
capricious action.

Regarding administrative convenience, the Secretary
ed that "the State is the only applicant whom the land
ice permits to file 'prematurely' " (p. 16), and thus
likelihood that the records will be cluttered with pre-
ure filing exists. There is nothing in the statute
ch permits this additional preference to the State of
ska. Such a determination is completely arbitrary and
ricious. In all matters other than the preference per-
, individuals are on an equal footing with the State
n it comes to withdrawn land.

The considerations of equity are disposed by the
retary's statement that the early filing merely advan-
the time to make its preference known and it was not
quitable to give the State a chance to take advantage
it. "No individual is harmed if the State is allowed
file somewhat sooner than general practice permits."
16).

This concept of "so what if the State fudges a bit"
ompletely outside of the clear meaning of the Alaska

tehood Act. It is not "general practice" which gives State of Alaska a preference period, but an express tutory provision. In addition, this general practice in line with the holdings of the United States Supreme rt.

The decision of the Secretary in applying the segre- ion theory to the case at hand was in light of the ex- ss statutory language and the law as it has developed, arly a decision not in accordance with the law. It was itrary and capricious and the District Court's decision ersing the Secretary should be affirmed.

IV

AMENDMENT THEORY OF THE SECRETARY OF THE INTERIOR IS HOUT FOUNDATION IN LAW.

In a last ditch effort to validate the void filing by State of Alaska on January 8, 1963, the Secretary of the rior viewed a number of amendments filed by the State laska during and after the preference period as reaffir- ons of the State's selection. He then held that these dments could be treated as if the State had refiled its inal application at the time of its amendments. For ority on this point, the Secretary cited two departmental sions, Hunt v. State of Utah, supra; and Trott v. North-

r *Pacific Ry. Co.*, 45 L.D. 193 (1916), neither of which r applicable to the facts in this case or are convincing n their own merit.

None of the amendments filed by the State of Alaska ecribed or covered the land involved in the case before hs Court. The total effect of the amendment was to add ad to that which was selected in the void filing on Janay 8, 1963.

The major case relied upon by the Secretary for this ulious attempt to validate a void filing is *Hunt v. State f Utah*, *supra*. In *Hunt*, the land under dispute had been uject to a powersite withdrawal when the State of Utah, n 1939, attempted to select lands under a grant of lands o Miners Hospitals. On December 17, 1940, the land was eleased from the powersite withdrawal and some two months ater in February, 1941, Hunt made application for a home nd business site. Subsequent to its 1939 selection and rior to release of the withdrawal order, the State of Utah iled a petition on June 27, 1940, under Section 7 of the ay or Grazing Act, for claissification of the lots as uitable for selection. The Commissioner of Public Lands, n May 16, 1941, reinstated the State of Utah's application nd rejected Hunt's application on the grounds that the

te's filing was first in point of time and that Hunt's osession of the land for business purposes was unlawful.

The decision in Hunt points out the confusion which xists in the Interior Department decisions regarding the plication of the segregation theory. The decision states ht:

> [T]he State's application for the lots was filed while they were in withdrawal and were not subject to appropriation. The State's application was, therefore, void and was properly rejected. Further, since no right was created by the application, none would be preserved by a reinstatement. Nor could any right be initiated thereby, for the status of the land on June 27, 1949, when the petition for reinstatement was filed, would be determining, and at that time the land was still under the spell of the withdrawal and therefore not subject to appropriation.
>
> It is clear, therefore, that to reinstate the application on May 16, 1941, in the presence of the prior adverse claim of Hunt was to accord preferential treatment to the State, and in effect through the doctrine of relation to confer on the State's void application the status of an application legally capable of giving rise to a right inceptive as of the time of the original filing or of the restoration of the lands to disposition. This was clearly contrary to established precedents. . . . 59 I.D. at 46-47.

However, after stating this valid legal position, the ecision goes on to treat the Commissioner's action in re-

stating the State of Utah's application as a ruling
at, in this circumstance, filing of a new application
s an unnecessary formality. Such reinstatement, how-
er, was subject to the rights that Hunt might be deemed
have acquired by his prior application.

Hunt v. State of Utah, *supra*, can only be viewed as
attempt by the Secretary, as in the case now before this
urt, to save a void selection for the benefit of a state
vernment. He at least rejected the segregation theory
Hunt. However, there exists an important distinction
tween *Hunt* and the facts of the case now under considera-
on. In *Hunt*, the reinstatement covered the lands in
troversy. Here the amendments filed by the State of
aska did not.

The other case relied upon by the Secretary, *Trott v.*
thern Pacific Ry. Co., *supra*, based its holding which
lidated certain land selections on the segregation theory.
us, its reasoning does not conform to the later case of
nt v. State of Utah, *supra*. It is not apparent from the
cision, but Trott appears to have validated just railroad's
endments. The Secretary said:

> "The original selection could have been and was allowed *as to tracts free from adverse claim*, as above stated, irrespective of the

supplemental lists." (p. 196) (emphasis added)

These cases only display the confusion that exists
hin the decisions handed down in the Department of the
erior regarding land upon which a premature filing has
n made.

To hold that the amendments filed by the State during
preference period are to validate the void filing of
State made on January 8, 1963 flies in the face of the
tute. Sections 6(b) and 6(g) of the Alaska Statehood
do not in any way permit such a construction. To view
statutory ninety day preference period as a mere form-
ty is not statutory interpretation but statutory des-
ction. The specific language set forth for a preference
the State of Alaska in Section 6(g) of the Alaska State-
d Act is not a mere formality. It sets forth a ninety
period and does not indicate that the State in any way
get around this by such means as the Secretary indicates.

Appellant Udall in his brief (p. 16) states that the
ndment concept is analogous to that which establishes
an invalid will can be revived by duly executed codi-
, and the will and codicil are regarded as one instru-
speaking from the date of the codicil. This is a
culous analogy, for the law regarding wills and codicils

developed from the common law as a means by which the ent of a testator could be implemented. The factors be considered when the intent of one man is being ascertained is quite distinct from a contest between parties er the public land laws. The public land laws have eloped completely separate from any law regarding wills estates. See Leach, Cases and Text on the Law of Wills, 59 (2nd Ed., 1960). Rules of interpretation with regard wills have no application to statutory interpretation.

The amendment theory of the Secretary of the Interior nreasonable and without foundation in law. The District rt properly held that it was contrary to the statute and ld not be considered to validate the State's void selecn.

V

THE STATE OF ALASKA SELECTION IN THIS INSTANCE WAS A ATION OF THE ALIENATION PROHIBITION OF SECTION 6(g) OF ALASKA STATEHOOD ACT.

The selection of lands in dispute was made on behalf of City of Anchorage (p. 2, appellant, State of Alaska's f). Not only did the City initiate the withdrawal proings, but it suggested that the land be placed under

al control. At no time did the State of Alaska, on its behalf, indicate an interest in the land in question, a desire to have it removed from the control of the fed-l government (see Exhibit "C" to State's appeal from the ision of the Director, Bureau of Land Management, July 1965).

Section 6(g) of the Alaska Statehood Act expressly pro-its the State from bargaining away its right of selection. rovides in part that:

> "The authority to make selections shall not be alienated or bargained away by the State of Alaska."

The legislative history of the land grant provisions of e Statehood Act reinforces the alienation prohibition of cion 6(g). Congress was concerned (1) with the fact that er cent of Alaska land was owned by the federal govern-n; and (2) with the need for Alaska to have revenue pro-ng land. Thus, Congress wished to insure that the State laska acquired control of substantial land holdings, and a any monies received upon its sale or lease flowed into ae coffers. See U.S. Code Congressional and Admin. News, 5, pp. 2933-3007.

The Secretary was in error when he stated that the land lction here did "not mean that the State has sold or other

[illegible]

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> [illegible]

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e disposed of its authority to make this selection or other." (p. 20).

Congress was not merely attempting to protect against right sale by the State of its authority to make selecns. The obvious purpose of the alienation prohibition vision was to preserve to the State, free from the exion of pressures and influences of groups with interests olved other than those of the State as a whole, the power decision as to which lands should be selected.

VI

THE SELECTION BY ALASKA OF THESE PARTICULAR LANDS WAS ISCRIMINATORY ACT IN FAVOR OF RESIDENTS OF ANCHORAGE TO DETRIMENT OF THE CITIZENS OF THE STATE AS A WHOLE.

The Alaska Statehood Act provided for a number of speci- land grants to the State of Alaska in addition to the ral grant under Section 6(b). One such specific grant ection 6(a), which permits the State of Alaska to select 400,000 acres of land for the purpose of furthering e development and expansion of its communities.

Inasmuch as Sections 6(a) and 6(b) limit the number of s that the State is entitled to, any selection under 6(b) the benefit of one particular community will benefit

t community at the expense of Alaskan citizens as a
le.

The Equal Protection Clause of the Fourteenth Amend-
t to the United States Constitution requires like treat-
t of persons similarly situated (16 Am.Jur.2d 849, Sec.
). If a law, nondiscriminatory on its face, is applied
a discriminatory manner, the application is unconstitu-
nal. _Discriminatory Law Enforcement and Equal Protection_
n The Law, 59 Yale L.J. 354 (1950); _Champlin Refining Co_.
Cruse, 115 Colo. 329, 173 P.2d 213 (1946).

While Sections 6(a) and 6 (b) of the Alaska Statehood
are nondiscriminatory on their face, the State's action
sing land from its acreage allotment under 6(b) for the
usive benefit of the residents of the City of Anchorage
conferred a benefit on a class not intended to be so
efitted. Application of the statute in so discriminatory
nner, in addition to being contrary to the intent of
ress, fails to satisfy the requirements of the Equal
ection Clause of the Fourteenth Amendment.

CONCLUSION

The District Court's holding that the Secretary of Interior acted in an arbitrary and capricious manner, in accordance with law, when he refused to record ap-lees' several notices of occupancy or settlement, should affirmed.

Under the scope of judicial review provided for admin-rative decisions in the Administrative Procedure Act, .S.C., Sec. 1009, an agency decision may be reversed and aside if found to be not in accordance with law and itrary and capricious. C.F. Coleman v. United States, F.2d 190 (1966).

Under the literal meaning of the Alaska Statehood Act, tions 6(b) and 6(g), the application filed by the State January 8, 1963 was void ab initio and a nullity. It not segregate the land from subsequent appropriation. addition, under the law segregation could not take place withdrawn land.

The so-called amendments, or additional selections made the State during the ninety day preference period, did embrace the lands selected on January 8, 1963, and thus ld not, under the literal construction of Section 6(g), ve to validate the previous void selection. The Secre-

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y's reliance on this factor was not in accordance with
.

Following the ninety day preference period, the lands
uestion became subject to the operation of the public
l laws generally, and the appellees' notice of location
ccupancy was subsequently duly tendered.

The Secretary's decision on January 20, 1966 was un-
onable, not in accordance with law, in excess of stat-
y authority and limitations, and the District Court's
r of October 31, 1966, reversing and setting aside the
etary's decision and ordering the Land Office to take
ssary action to accept appellees' claims should be
rmed.

DATED this 21st day of September, 1967.

HUGHES, THORSNESS & LOWE
Attorneys for Appellees

By
MURPHY L. CLARK

CERTIFICATE

I certify that, in connection with the preparation this brief, I have examined Rules 18, 19 and 39 of the ted States Court of Appeals for the Ninth Circuit, and t, in my opinion, the foregoing brief is in full compli- e with those rules.

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by MURPHY L. CLARK

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 21629, 21629A

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
AND THE STATE OF ALASKA,

Appellants

v.

ANDREW J. KALERAK, ET AL.,

Appellees

CERTIFICATE OF SERVICE

I certify that reproduced copies of the brief for the appellees were served on counsel for appellants by mailing, postage prepaid, three copies of same this 25th day of September, 1967, to: Richard L. McVeigh, Esquire, United States Attorney, Federal Building, Anchorage, Alaska 99501 and Honorable Edgar P. Boyko, Esquire, Attorney General State of Alaska, Pouch K, State Capitol, Juneau, Alaska 99801.

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